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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER CANON, Defendant and Appellant.	A133342 (San Francisco County Super. Ct. No. 209815)

Christopher Canon appeals from a judgment upon a jury verdict finding him guilty of second degree murder (Pen. Code,[1]187). The jury also found true the allegation that defendant personally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). In a separate court trial, the court found defendant guilty of assault on a peace officer with force likely to cause great bodily injury (§ 245, subd. (c)) and assault with force likely to cause great bodily injury (§ 245, subd. (a)(1)). Defendant contends that the trial court erred in instructing the jury on manslaughter and that the trial court's imposition of a 49-years-to-life term constitutes a de facto term of life imprisonment without parole (LWOP) in violation of the Eighth Amendment. We agree that defendant's sentence is in effect the functional equivalent of an LWOP term (*People v. Caballero* (2012) 55 Cal.4th 262, 268 (*Caballero*)), and thus deprives him of a meaningful opportunity for parole in violation of the Eighth Amendment as interpreted in

[1] All further statutory references are to the Penal Code.

Graham v. Florida (2010) 560 U.S. 48, 74 (*Graham)* and *Miller v. Alabama* (2012) 132 S.Ct. 2455, 2460 (*Miller*). We therefore remand the matter for resentencing.

I. FACTS

A. The Murder

On November 11, 2007, Michael Price, Jr., age 18, and his cousins, Kiengi White and Karesha Goodman drove from Oakland to San Francisco to meet with three friends. They met their friends in downtown San Francisco and the group went to the Metreon where they played some video games in the arcade on the second floor. They arrived at the Metreon at approximately 6:00 p.m. About an hour later, they decided to leave and took the escalator to the exit. Price and White followed the others down the escalator. When White and Goodman stepped off the escalator on the first floor, they heard Price's voice. White turned around and saw defendant and another boy approach Price. White walked toward them. White heard defendant tell Price, "I'll pop you" two or three times. White told defendant, "Go on with all that," meaning "just leave it alone." Defendant had his right hand in the crotch area of his pants.

Price and White walked away toward the exit of the Metreon. Price had to use the bathroom so they stopped near the Sony PlayStation area to find one. Defendant walked by and asked Price, "You want to take it outside?" Price responded, "We can throw them if you want to throw them," meaning "we can fist fight." Defendant again said, "I'll pop you" about three times. Defendant then fired a gun, shooting Price. White heard four gunshots. Price fell to the ground; White saw defendant and his friend run out of the entrance of the Metreon. Goodman also heard Price arguing with someone. She heard Price say, "you want to . . . you want to just fight," and heard another voice say, "I'll pop you." She walked back towards Price and saw that he was arguing with defendant. Price took off his jacket, and defendant pulled his gun and started shooting him. Goodman heard three or four shots.

White went to Price's aid and tried to call 911. He was unable to get through to 911, but a police officer responded to the scene within about a minute. Price died as a result of multiple gunshot wounds.

Several other people at the Metreon observed or heard the altercation and shooting. A security videotape from the Metreon depicting the scene of the shooting and showing defendant and Price was played for the jury.

Sergeant Henry Yee was directing traffic at the corner of Fourth and Mission Streets on the evening of the shooting. At approximately 7:00 p.m., he heard several gunshots coming from the Metreon. He immediately ran to the Metreon where he found Price on the ground. He also saw several shell casings near Price's body. Yee summoned an ambulance.

In the meantime, Captain Daniel McDonagh was also working near the Metreon when he saw defendant running on Mission Street with a gun in his left hand. McDonagh pursued defendant, who raised his gun and pointed it at McDonagh's body. Defendant turned onto Jessie Alley and ran into the Bloomingdale's store. McDonagh continued to chase defendant, and radioed his location. Once defendant exited from the store onto Mission Street, other officers were able to apprehend him. The police located a firearm at the northwest corner of Fourth and Mission Streets. McDonagh testified that the gun was similar to the weapon he saw in defendant's possession. A criminalist testified that the gun found by the police fired the four cartridge casings that were located at the scene.[2]

Inspector John Cleary interviewed defendant at about 11:50 p.m. on the evening of his arrest.[3] A videotape of the interview was played for the jury. Although defendant initially explained that the shooting had happened behind him as he was walking in the Metreon, he subsequently admitted that he got into an argument with Price because Price was walking too slow on the escalator. Price said, "Man, I'll whip your ass." Defendant shot Price two or three times.

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[2] The police also found a pocket knife and some clothing at the scene. White identified the knife as belonging to Price. He testified, however, that he did not see Price with the knife on the day of the shooting.

[3] Defendant was then 15 years old.

Dr. Amanda Gregory testified on behalf of the defense as an expert in clinical neuropsychology. She opined that the adolescent brain is not fully developed particularly in the areas of higher level cognitive functions such as judgment, reasoning, impulse control, and considering the consequences of behavior. Dr. Gregory examined defendant when he was almost 18 years of age and found that he had no evident brain deficits and his cognitive abilities were within the average range.

B. The Assaults

1. Assault on a peace officer

At about 10:50 a.m. on April 6, 2008, John Zerbe was working as a counselor and peace officer at the Juvenile Justice Center in San Francisco (JJC). Defendant was in Unit 7 and was using the telephone during his morning recreational time. Defendant ended his call after about seven to eight minutes and approached Officer Jesse Aguilar at the counselor's desk and told him that he had been disconnected and wanted to call again to complete the conversation. Aguilar refused to allow defendant to make another call because defendant wanted to call a number that was not on the approved list. Defendant became upset and agitated.

Zerbe approached defendant and asked him to sit down at one of the dining tables. Defendant sat down and told Zerbe that he was upset about not being able to make his phone call. Zerbe told him that he would talk with Aguilar. While Zerbe was talking with Aguilar, defendant got up from the table and moved closer to the counselor's desk. Zerbe told defendant to sit down. He was hoping to diffuse the situation, but defendant continued to walk around. Zerbe then directed defendant and the rest of the detainees to return to their rooms. When Zerbe looked toward the group of detainees that was beginning to move toward their rooms, defendant lunged toward him and punched him in the left side of his face. The punch fractured Zerbe's upper molar and caused a jaw contusion. Zerbe was unable to eat solid foods for a couple of days and his jaw was sore for one to two weeks. He was on medical leave for 18 days as a result of the injury.

2. Assault with force likely to cause great bodily injury

On January 5, 2009, Reginald Cooks was working as a counselor at the JJC. He was in the gym with about 12 detainees including defendant. After the detainees played flag footfall, one of the detainees punched another detainee in the face. The victim fell to the ground and appeared unconscious. Cooks pulled the perpetrator away but as he did so, defendant began punching the victim in the face. Defendant punched the victim three to four times. The victim was bleeding from the mouth and had a laceration on his upper lip. Medical personnel responded and the victim regained consciousness.

II. DISCUSSION

A. Manslaughter Instruction

The trial court instructed the jury on first and second degree murder as well as the lesser offense of voluntary manslaughter. The court instructed on voluntary manslaughter in accordance with CALCRIM No. 570.[4] During deliberations, the jury asked the court for a definition of the term, "average disposition." After conferring with

[4] In pertinent part, CALCRIM No. 570 provides as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. the defendant was provoked; [¶] 2. [as a] result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; AND [¶] 3. The provocation would have caused a person of *average disposition* to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] . . . [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of *average disposition*, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." (Italics added.) Our Supreme Court recently approved CALCRIM No. 570, noting that "[t]elling the jury to consider how a person of average disposition 'would react' properly draws the jury's attention to the objective nature of the standard and the effect the provocation would have on such a person's state of mind." (*People v. Beltran* (2013) 56 Cal.4th 935, 954.)

counsel, the court responded, "In response to your question re: CALCRIM 570 'a person of average disposition . . .' please refer to CALCRIM 200."[5]

Defendant contends that the trial court erred in failing to instruct the jury that it could consider youth in its analysis of whether a person of average disposition would have been sufficiently provoked as a result of a sudden quarrel or heat of passion. We need not decide the substantive merits of this issue because we conclude that the evidence fails to show that defendant was sufficiently provoked regardless of his age. Accordingly, any instructional error was harmless.[6]

"Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*People v. Moye* (2009) 47 Cal.4th 537, 449–550.) "To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection." (*People v. Beltran, supra,* 56 Cal.4th at p. 949.) Whether the provocation was adequate is determined by an objective test. (*Id.* at p. 950; *People v. Lee*

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[5] In relevant part, CALCRIM No. 200 provides, "[s]ome words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions . . . . Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

[6] For the same reason, we need not decide whether defendant waived the issue or invited the error when he requested that the jury be instructed pursuant to CALCRIM No. 200.

(1999) 20 Cal.4th 47, 60.) "The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation and heat of passion must be affirmatively demonstrated." (*Lee, supra,* 20 Cal.4th at p. 60.)

Here, the evidence fails to demonstrate that defendant was sufficiently provoked to react without reflection based on his altercation with Price. As the Attorney General points out, defendant's annoyance that Price was moving too slowly on the escalator would not have caused a reasonable person—whether an adult or a teenager—to be so inflamed as to lose all reason and judgment. While an argument between defendant and Price ensued with name-calling, and mutual invitations to fight outside, Price's conduct was insufficiently provocative to incite an ordinary person of average disposition to act rashly or without due deliberation and reflection. (See *People v. Najera* (2006) 138 Cal.App.4th 212, 226 and fn. 2 [victim's name-calling and pushing of the defendant to the ground insufficiently provocative under an objective standard to cause an ordinary person of average disposition to act rashly or without due deliberation]; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303, 1313 [defendant who provokes a fight by taunts and threats of violence is not entitled to claim provocation when the victim responds by engaging in a fight].) In this case, Price's taunts to "throw them" or "just fight" were so slight that a reasonable person of any age would not have acted rashly or without due deliberation. There was simply insufficient evidence that Price provoked defendant to react in a heat of passion. Hence, even if the trial court erred in its instructions to the jury on the issue, the error was harmless. (See *People v. Beltran, supra,* 56 Cal.4th at pp. 955–956 [*Watson* standard of harmless error applies to issues concerning misdirection of the jury]; *People v. Breverman* (1998) 19 Cal.4th 142, 177–178 [same].) It is not reasonably probable that defendant would have obtained a more favorable verdict absent any instructional error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

B. Sentencing

The trial court sentenced defendant to the indeterminate term of 15 years to life on the second degree murder count plus an additional mandatory term of 25 years to life for the gun enhancement for a total indeterminate term of 40 years to life. In addition, the court imposed a determinate term of five years on the assault upon a peace officer offense plus an additional term of three years for the great bodily injury enhancement, and a consecutive one-year term on the second assault offense, for a total term of 49 years to life in state prison. Defendant contends that the sentence imposed violates the Eighth Amendment because the court failed to consider the mitigating circumstances of his youth and background as required by *Miller, supra,* 132 S.Ct. at pp. 2468–2469.

In *Graham, supra,* 560 U.S. at p. 74, the United States Supreme Court held that the Eighth Amendment prohibits states from sentencing a juvenile convicted of nonhomicide cases to life imprisonment without the possibility of parole. The Court mandated that juvenile offenders must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* at p. 75.) The Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. [Citations.] Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults. [Citation.] It remains true that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.' " (*Id.* at p. 68.) The Court therefore concluded that an LWOP sentence was "not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." (*Id.* at p. 74.)

In *Miller, supra,* 132 S.Ct. at p. 2460, the United States Supreme Court applied the reasoning of *Graham* to homicide cases, holding that mandatory LWOP sentences for juveniles violate the Eighth Amendment's prohibition on cruel and unusual punishment. Although the court did not foreclose a court's ability to impose an LWOP term on " 'the

rare juvenile offender whose crime reflects irreparable corruption,' " the Court required that courts "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at p. 2469, citations and footnote omitted.) The court recognized that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." (*Id.* at p. 2468.)

In *Caballero, supra,* 55 Cal.4th at p. 265, our Supreme Court addressed the applicability of *Graham* and *Miller* to a juvenile convicted of nonhomicide offenses and sentenced to a 110 years to life term. The *Caballero* court held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id.* at p. 268.) The court determined that a "term-of-years sentence that amounts to the functional equivalent of a life without parole sentence" constitutes cruel and unusual punishment. (*Id.* at pp. 268–269.) The Court reasoned that "[a]lthough proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*Ibid.*) The Court urged the Legislature to address the issue by enacting legislation to establish a parole procedure to permit juvenile defendants serving a de facto LWOP term for nonhomicide crimes to have an opportunity to obtain release upon a showing of rehabilitation and maturity. (*Id.* at p. 269, fn. 5.) The

Caballero court declined to consider the question of whether de facto life sentences for juveniles in homicide cases violate the Eighth Amendment. (*Id.* at p. 268, fn. 4.)

The Legislature responded to our Supreme Court's suggestion in *Caballero* to enact legislation establishing a parole eligibility mechanism providing juvenile offenders who are committed to state prison with an opportunity for release. (See § 3051 (Stats. 2013, ch. 312, § 4 (Sen. Bill No. 260 (2013–2014 Reg. Sess.)).) It "recognized[d] that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*] and [*Miller*]. . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (Stats. 2013, ch. 312, § 1, pp. 2–3.)

Section 3051 hence provides that "any prisoner who was under 18 years of age at the time of his or her controlling offense" shall be provided a "[a] youth offender parole hearing . . . for the purpose of reviewing the [prisoner's] parole suitability." (§ 3051, subd. (a)(1).) "A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing . . . ." (§ 3051, subd. (b)(3).)

In *People v. Gutierrez* (2014) 58 Cal.4th 1354, our Supreme Court considered an analogous statute, section 1170, subdivision (d)(2) (section 1170(d)(2)), which provides for the possibility of a resentencing hearing for a juvenile offender convicted of homicide

and committed to an LWOP term pursuant to section 190.5, subd. (b).[7] The Court explained that, in sentencing a 16- or 17-year-old juvenile convicted of special circumstance murder under section 190.5, subd. (b), the court has discretion to impose either LWOP or 25 years to life, and that section 190.5, subd. (b) carries no presumption in favor of LWOP (as it had been previously construed). (*Id.* at pp. 1360–1361.) The court directed trial courts, in exercising their sentencing discretion, to consider "all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller* and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders' " before imposing an LWOP term on a juvenile offender. (*Id.* at p. 1390.) The *Gutierrez* court stressed that a sentencing court must consider the *Miller* factors at the outset of sentencing a juvenile offender. (*Id.* at p. 1389.) It thus rejected the argument that section 1170(d)(2), which provides for the recall of a defendant's LWOP sentence after the defendant has served 15 years, cures the constitutional infirmity.[8]

As the court in *Gutierrez* explained, "the potential for relief under section 1170(d)(2) does not eliminate the serious constitutional doubts arising from a presumption in favor of life without parole under section 190.5[, subd.] (b) because the same questionable presumption would apply at resentencing. The statute makes clear that if the sentencing court grants an inmate's petition for a resentencing hearing, the hearing must be conducted 'in the same manner as if the defendant had not previously been sentenced.' (§ 1170, subd. (d)(2)(G).)" (*Id.* at p. 1385.) "[I]t is doubtful that the potential to recall a life without parole sentence based on a future demonstration of

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[7] Section 190.5, subd. (b) provides that 16- or 17-year-old juveniles who are convicted of special circumstance murder "shall be confine[d] in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

[8] Section 1170(d)(2) provides: "When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has served at least 15 years of that sentence, the defendant may submit to the sentencing court a petition for recall and resentencing."

rehabilitation can make such a sentence any more valid when it was imposed." (*Id.* at pp. 1386–1387.) The court remanded the matter for resentencing for a consideration of the *Miller* factors in the exercise of its discretion conferred by section 190.5, subd. (b). (*Id*. at pp. 1391–1392.)

Section 3051, which provides for a parole hearing in the future, likewise does not assure that a defendant will have the meaningful opportunity to address his individual differences and his "incorrigibility" at the outset of his sentencing. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1386; see *Graham*, *supra,* 560 U.S. at p. 75.) Defendant's 49 years to life sentence is tantamount to a de facto LWOP term within the meaning of *Caballero* because defendant will be almost 65 years old at the time of his minimum parole eligibility date in 2056. Although defendant's life expectancy may very well exceed 65 years (see *People v. Mendez* (2010) 188 Cal.App.4th 47, 63 [life expectancy of 18-year-old American male is 76 years], we conclude that *Miller* requires a sentencing court to consider a defendant's youth when imposing an aggregate sentence that may require the defendant to spend all, or nearly all, of the rest of his or her life in prison.[9] The same considerations attendant to juveniles sentenced to LWOP apply equally to a defendant sentenced to the functional equivalent of life in prison. In sum, *Miller*'s mandate that a sentencing court "have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles" applies as well to de facto LWOP sentences. (*Miller, supra,* 132 S.Ct. at p. 2475; *Caballero, supra,* 55 Cal.4th at pp. 268–269.)

Here, the court indicated in its remarks at the sentencing hearing that it had read the probation report, the social study of defendant authored by Erin M. Brown, MSW and the attached letters submitted in support of the defendant as well as the sentencing

[9] A defendant serving an indeterminate sentence for murder may serve up to life in prison depending on a number of factors including his or her suitability for parole, the circumstances surrounding the offense(s) for which he or she was convicted, and considerations of public safety. (See *In re Dannenberg* (2005) 34 Cal.4th 1061, 1078–1079.)

memoranda submitted by the district attorney and defense counsel. Only the social study contained an analysis of defendant's background and his progress in custody.[10] The social study detailed defendant's family history which included a significant history of physical abuse. Defendant reported that he had been physically abused since he was a toddler; on one occasion he was hung upside down naked and beaten with an electrical cord. Numerous members of his extended family engaged in the beatings including his father, aunts, uncles, and grandmother. The beatings were perpetrated with hands, fists, belts, hangers, extension cords, branches, shoes, and brooms. He ran away from home a few times after being beaten.

Defendant is the third and youngest child of his parents and has two half-siblings. His parents had an emotionally and physically abusive relationship; defendant said that his father once pointed a gun at his mother. His siblings also reported that they were physically abusive to defendant and corroborated his account of abuse by other family members. They also noted that their mother was not affectionate. She was a compulsive gambler and had a problem with alcohol. She did not consider corporeal punishment as abuse.

Defendant's family's living situation was unstable; he lived in at least ten different homes and four cities in his youth. He grew up in the projects and sometimes did not have enough food. His mother often did not have enough money to provide for her children. On two occasions, the children were reported to child protective services for neglect.

[10] The probation report simply noted that at the time of sentencing, defendant was 19, was close to his siblings, and had received a high school diploma while incarcerated. He was single and had no employment history. Defense counsel's sentencing memoranda did not reference the social study and stated only that defendant was 15 at the time of the offense, he had acted out of a fear for his safety, he had the undeveloped frontal lobe of an adolescent brain, and had no prior sustained petitions as a juvenile. The district attorney's memorandum made no reference to defendant's youth.

Defendant's mother reported that defendant experienced anger and frustration easily. He had an inability to manage his frustration and impulses and this caused him problems in school.

Defendant also experienced violence and trauma in the community. He lost several friends to murder and had witnessed shootings. He was the victim of two robberies, and was "jumped" numerous times. He was a very small boy, only four feet seven inches until he was in the eighth grade and was an easy target. Defendant also suffered from nightmares as a child and they have persisted into his adulthood.

The social study further reported that defendant had progressed dramatically since his last in-custody offense in 2009. He has engaged in numerous programs including aggression replacement training, individual therapy, occupational therapy training, GED study hall, and has written extensively and contributed regularly to *The Beat Within*, a bi-weekly literary publication of San Francisco's JJC. Numerous service providers sent letters to the court acknowledging defendant's positive changes, the development of his self-esteem, and personal and academic success. Indeed, both his therapist and the JJC's librarian recognized defendant as having the greatest transformation among the youth with which they had worked. Defendant earned his high school diploma and was the valedictorian of the JJC's graduating class of 2010. He was selected to participate in the online college program which enrolls only two to three students per year.

The social study also included the clinical impressions of Dr. Amanda Gregory, a neuropsychologist, who conducted an assessment of defendant. Her evaluation found that defendant has a history of adolescent onset conduct disorder and symptoms of attention deficit hyperactivity disorder (ADHD), impulsive/hyperactive type. Gregory opined that ADHD is associated with delayed brain development, particularly in the frontal lobes, which is the region of the brain involved in inhibiting emotions and impulses. Due to defendant's history of trauma and physical abuse, he was at risk of reacting to perceived threats in a more intense and impulsive manner. She found no evidence of malingering.

Although the record shows the sentencing court had "read and considered" the social study, the record also demonstrates that the court was not aware of its constitutional obligations under *Miller* and *Caballero*—nor could it have been since the sentencing hearing occurred in the year preceding those decisions.

The court's imposition of a de facto life term without consideration of defendant's youth, neurological development, family history, and prospects for rehabilitation deprived him of the *Miller* analysis required to withstand an Eighth Amendment violation. That section 3051 now provides a parole eligibility mechanism under which defendant might be afforded an opportunity for meaningful parole after he has served 25 years does not ameliorate the constitutional infirmity of his de facto life sentence. The trial court's statement that it had considered the probation report, sentencing memoranda, and social study was not in and of itself sufficient to establish that it presumably conducted the requisite analysis of the *Miller* factors. Not surprisingly—since the hearing occurred a year before *Miller* was decided—the sentencing hearing lacked any analysis in this regard; neither the court nor the parties addressed the facts of defendant's youth and background or his capacity for reformation as considerations in sentencing. In sum, it is clear that the court did not consider whether a 49-years-to-life sentence was appropriate in light of defendant's age.

At oral argument, the Attorney General argued that *Miller* does not apply because section 3051 provides defendant with the opportunity to obtain a parole date after serving 25 years, and therefore his sentence is no longer an effective LWOP sentence. We

disagree.[11] As the *Gutierrez* court explained in construing the analogous section 1170(d)(2) statute, "it is doubtful that the potential to recall a life without parole sentence based on a future demonstration of rehabilitation can make such a sentence any more valid when it was imposed. If anything, a decision to recall the sentence pursuant to section 1170(d)(2) is a recognition that the initial judgment of incorrigibility underlying the imposition of life without parole turned out to be erroneous. Consistent with *Graham*, *Miller* repeatedly made clear that the sentencing authority must address this risk of error by considering how children are different and how those differences counsel against a sentence of life without parole '*before* imposing a particular penalty.' " (*Gutierrez, supra*, 58 Cal.4th at pp. 1386–1387, citing *Miller, supra*, 567 U.S. at p. ___; 132 S.Ct. at p. 2471.) "Neither *Miller* nor *Graham* indicated that an opportunity to recall a sentence of life without parole 15 to 24 years into the future would somehow make more reliable or justifiable the imposition of that sentence and its underlying judgment of the offender's incorrigibility 'at the outset.' " (*Id.* at p. 1386, quoting *Graham, supra*, 560 U.S. at p. 75.) Although we are cognizant of the differences between a right merely to petition for a recall and re-sentencing versus the right to an actual parole suitability

[11] Our Supreme Court has granted hearing in several cases to consider whether section 3051 renders moot any claim that a de facto life sentence violates the Eighth Amendment. (See, e.g., *In re Alatriste* (2013) 220 Cal.App.4th 1232, review granted Feb. 19, 2014, S214652 [affirming 77 years to life and 50 years to life sentences in light of section 3051's provision for parole hearings]; *People v. Martin* (2013) 222 Cal.App.4th 98, review granted Mar. 26, 2014, S216139 [sentence of two consecutive life terms constitutional given section 3051's provision for a youth offender parole hearing]; *In re Heard* (2014) 223 Cal.App.4th 115, review granted Apr. 30, 2014, S216772 [term of 80 years to life plus 23 years unconstitutional; matter remanded for resentencing]; *People v. Solis* (2014) 224 Cal.App.4th 727, review granted Jun. 11, 2014, S218757 [court modified sentence to reflect defendant's entitlement to a parole hearing after serving 25 years in prison]; *People v. Franklin* (2014) 224 Cal.App.4th 296, review granted Jun. 11, 2014, S217699 [section 3051 moots challenge to de facto life term of 50 years to life]; and *People v. Gonzalez* (2014) 225 Cal.App.4th 1296, review granted Jul. 23, 2014, S219167 [50 years to life term not unconstitutional because section 3051 effectively modified the sentence to afford the defendant a parole date well within his life expectancy].)

hearing, we conclude that defendant's right to a parole hearing after he has served 25 years in prison is not a substitute for the court's consideration of defendant's individual differences at the time of sentencing. We therefore must remand the matter for resentencing.

III. DISPOSITION

The matter is remanded to the trial court for reconsideration of defendant's sentence in a manner consistent with this opinion.[12] In all other respects, the judgment is affirmed.

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Rivera, J.

We concur:

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Ruvolo, P.J.

_____
Humes, J.

[12] We recognize that the 15-years-to-life term for second degree murder and the 25 years to life sentence for the gun enhancement are mandatory (§§ 190, subd. (a); 12022.53, subd. (d)), and that the court therefore lacks discretion in its sentencing decision on these offenses regardless of its consideration of the *Miller* factors.